CF0000059336

(02)

Division Bench (Cri. Side)

INTHE HIGH COURT OF MADHYA PRADESH AT JABALPUR.

CRIMINAL APPEAL NO. 665 OF 1991.

APPELLANT:- Sukhiram son of Neetram, aged 25 years, Nagaikiya, Occ upation-Agriculture, R Resident of Village, Soor, Thana, Sitapur, Tahsil Seetapur, District Surguja, Madhya Pradesh.

V E R S U S

RESPONDENT:- S TATE OF MADHYA PRADESH
Through P.S. Sitapur Distt. Surguja.

APPEAL UNDER SECTION 374 OF THE CODE OF CRIMINAL PROCED URE.

(19) A.F.R.

**HIGH COURT OF CHHATTISGARH AT BILASPUR**

**Cr.Appeal No.665/91**

Sukhiram

-Versus-

State of Madhya Pradesh (now Chhattisgarh)

JUDGMENT FOR CONSIDERATION

Sd/-
Dilip Raosaheb Deshmukh
Judge

**Hon'ble Shri Justice Fakhruddin**

I agree

Sd/-
Fakhruddin
Judge

Post for 02.08.2005

Sd/-
Fakhruddin
Judge

(1) (20) A.F.R.

**HIGH COURT OF CHHATTISGARH AT BILASPUR**

**Cr.Appeal No.665/91**

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-Versus-

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**CORAM: HON'BLE SHRI FAKHRUDDIN,**
**HON'BLE SHRI DILIP RAOSAHEB DESHMUKH, JJ**

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Shri Shailendra Shukla, Counsel for the appellant.

Shri Akhil Mishra and Shri Ravindra Agrawal, Panel Lawyers for the State.

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**J U D G M E N T**
(Delivered on 02.08.2005)

**Per Dilip Raosaheb Deshmukh, J.**

This appeal is directed against the judgment dated 11.4.1991 delivered by Shri B.B.L.Agrawal, Sessions Judge, Ambikapur, Surguja in sessions trial No. 812/1990 whereby the appellant was convicted under Section 302 I.P.C. for committing murder of his brother Kunwar Sai on 1.2.90 at about 8.00 P.M. in village Soor, Police Station Sitapur, Tahsil Sitapur, District Surguja and sentenced to undergo imprisonment for life.

2. Admittedly the appellant and the deceased Kunwar Sai were real brothers. Maniram P.W.6 is the father and Harmunia P.W.4 is the mother of the appellant.

3. The factual matrix lies within a narrow compass. Maniram had partitioned the agricultural land between the appellant and the deceased. The deceased had sold his lands and used to ask

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the appellant to leave the house. Deceased Kunwar Sai was a habitual drunkard and often used to quarrel and beat Sukhiram and his parents under the influence of liquor. On 1.2.1990 at about 8.00 P.M. the deceased Kunwar Sai came in an intoxicated state and started quarrelling with the appellant. The appellant snatched the 'Basula' from the deceased and dealt 4 to 5 blows with the 'Basula' on the head of the deceased. Kunwar Sai died on the spot. Appellant made extra judicial confession before the village Chowkidar Mangal Das P.W.1 who lodged the F.I.R. Ex.P.1 at Police Station Sitapur at about 22.15 hours on 1.2.90. Marg intimation Ex.P.2 was registered. Investigating Officer R.N.Yadav reached the spot on 2.2.90 and prepared Panchnama of the body of the deceased Kunwar Sai. Autopsy was conducted by Dr. K.K.Dutta P.W.8 on 2.2.90 who found the following external injuries on Kunwar Sai:-

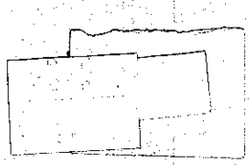
i) Incised wound 2" x ¾" over frontal region (forehead) near mid line on left side vertically placed and was bone deep.

ii) Incised wound 2" x ½" x bone deep just parallel and lateral to injury No.1.

iii) Lacerated wound 3 ½" x 1" x deep upto bone. Brain material had come out through wound over left temporal region directing lateral to medially upwards.

iv) A lacerated wound 2 ½" x ¾" x bone deep and brain deep as brain material protruding out, and site was left tempero occipital region behind injury No.3 and obliquely placed from anteriolaterally to posterio medially and upwards.

v) Abrasion 1" x ½" over back and left shoulder joint area.



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vi) Contusion 1 ½" x 1" over right side of front of chest at 5th inter-coastal space in mid clavicular line.

On dissection, it was found that:

i) Fracture of frontal bone in two pieces sizing 2" x 1 ½" rectangular piece each and depressed in nature. On removing pieces haematoma was present over brain and corresponding to external injury No.1 and 2.

ii) Multiple fractures in left temporal region and brain material coming out. Few pices were buried in brain matter, haematoma present underneath the fracture site. It corresponds to external injury No.3 & 4.

iii) Fracture of 5th & 6th ribs in clavicular line under and corresponding to external injury No.6. No injury over pleura and lung.

In the opinion of the Dr. K.K.Dutta, external injuries No.3 & 4 were sufficient in the ordinary course of nature to cause death since the hurt was so powerful that brain material protruded out and deceased had died instantaneously after sustaining the injury. In his report Ex.P.10 Dr. K.K.Dutta opined that death was due to coma and hemorrhagic shock within 12 to 14 hours prior to examination.

4. Investigating Officer R.N.Yadav seized the plain soil and blood stained soil from the spot vide Ex.P.6 and also seized from the spot one iron Basula with a wooden handle which had blood like stains vide Ex.P.7. Vide seizure memo Ex.P.8 he also seized one green Lungi and Sando Banyan having blood like stains from the accused on 2.2.90. After completion of investigation, the accused was prosecuted for an offence under Section 302 I.P.C.

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5. The accused abjured his guilt. However, in his examination under Section 313 Cr.P.C. he stated that Kunwar Sai had sold his portion of the land and used to quarrel with him and his parents every now and then. On many occasions, Kunwar Sai had assaulted him. On the night of occurrence Kunwar Sai in an intoxicated state assaulted his father Maniram on the head by Basula whereupon Maniram had dealt 2 - 3 lathi blows on the head of Kunwar Sai. Kunwar Sai then also assaulted him by Basula on the shoulder whereupon exercising the right of private defence, he had snatched the Basula from the deceased and had inflicted only one injury over the cheek of Kunwar Sai by Basula. No evidence in defence was adduced.

6. Counsel for the appellant has assailed the conviction of the appellant under Section 302 I.P.C. mainly on the ground that the defence of exercise of right of private defence of person by the appellant is totally borne out from the cross-examination of Harmunia P.W.4, Nanbai P.W.5 and Maniram P.W.6 and also Mangal Das P.W.1. The learned counsel for the appellant has also argued that the ocular evidence read with the evidence of Dr. K.K.Dutta P.W.8 proved that the fatal injuries sustained by the deceased Kunwar Sai were inflicted by Maniram P.W.6. On the other hand, the learned Panel Lawyer supported the judgment of the trial Court.

7. Prosecution examined as many as 13 witnesses in this case. Mangal Das P.W.1 has deposed that in the night of occurrence the appellant Sukhiram came to his house at night and told him that

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he had killed his brother by Basula whereupon he had taken the appellant to Police Station Sitapur and lodged the F.I.R. In cross-examination paragraph 5 onwards, this witness has fully supported the defence version and deposed that Sukhiram (appellant) had told him that Kunwar Sai wanted to assault Maniram (P.W.6), Harmunia (P.W.4) and the appellant and since there was an imminent danger to his life he had snatched the Basula from Kunwar Sai and had assaulted Kunwar Sai by the Basula in order to save his own life. He also admitted that Kunwar Sai was a drunkard and had sold his share of the lands and was repeatedly beating the appellant as well as his parents.

8. Dhanpat Bai P.W.2 is the wife of Mangal Das P.W.1 and has deposed that at night the appellant came to their house and said that he had killed his brother. However, in cross-examination, she deposed that since the appellant and her husband were at a distance she could not hear their conversation.

9. Jainath P.W.3 did not support the prosecution version and was turned hostile. Harmunia P.W.4 is the mother of the appellant. In her examination-in-chief she has deposed that Kunwar Sai had hurled filthy abuses to her due to which she had run away from the house and when she returned at about 8.00 P.M. she saw that Kunwar Sai was lying unconscious in an intoxicated state. In cross-examination, she has admitted that Kunwar Sai was a habitual drunkard and used to beat them. She has also admitted that Kunwar Sai had assaulted Sukhiram by a Tangia about two years prior to the occurrence and used to

threaten them whereupon they had lodged report against Kunwar Sai on several occasions. At the time of occurrence when she returned with her husband-Maniram to the house of the appellant, Kunwar Sai in an intoxicated state was abusing Sukhiram while holding Basula. When Kunwar Sai saw Maniram, he assaulted him on the head by the Basula. On this, her husband-Maniram dealt 2 – 3 lathi blows on the head of Kunwar Sai. Thereafter, the deceased assaulted Sukhiram by a Basula over his shoulder. At this juncture, Sukhiram had snatched the Basula from Kunwar Sai and had assaulted him on the cheek with the Basula. In this way, this witness has also supported the defence version in toto.

10. Nanbai P.W.5 has, in cross-examination paragraph 2, completely supported the defence version that Kunwar Sai had assaulted Maniram by Basula on the head whereupon Maniram had dealt 2 – 3 lathi blows on the head of Kunwar Sai, as a result of which blood started oozing out of the head of Kunwar Sai. Thereafter, Kunwar had assaulted Sukhiram by Basula on the shoulder whereupon Sukhiram had snatched the Basula and inflicted one blow on the cheek of Kunwar Sai by Basula.

11. Maniram P.W.6, the father of the appellant, has in his examination-in-chief stated that Sukhiram had assaulted Kunwar Sai whereupon blood started oozing from the cheek of Kunwar Sai who died thereafter. However, in cross-examination, even this witness has completely supported the defence version and has admitted that Kunwar was abusing Sukhiram in an intoxicated state while holding Basula and when Kunwar assaulted Maniram

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on the head by the Basula, he dealt with 2 – 3 lathi blows on the head of Kunwar whereupon a quarrel ensued between Kunwar and Sukhiram.

12. P.W.7 Mohanram is the witness of seizure of soil and iron Basula from the place of occurrence. Dr. K.K.Dutta P.W.8 who conducted the post-mortem report vide Ex.P.10 has deposed that external injuries No.3 & 4 mentioned above in paragraph 3 were fatal since they were inflicted with such force that the brain material had come out and the deceased had died instantaneously. Parameshwar P.W.9 is the Patwari who had prepared the spot map. Ismail P.W.10 is the witness of the seizure of one sealed packet. Phutki Bai P.W.11, the sister of the deceased, has not supported the prosecution case and was declared hostile. Prem Sai P.W.12 did not depose against the appellant. Chamru Prasad Gupta P.W.13 is the witness of Panchnama of the dead body of Kunwar Sai and constable Dineshwar Pandey P.W.14 has deposed about taking a sealed packet to the Forensic Science Laboratory, Sagar.

13. The purpose of describing the evidence adduced by the prosecution in details in the above paragraphs is to show that there is not even an iota of evidence which would go to show that the external injuries No.3 & 4 on Kunwar Sai mentioned above in paragraph 3 which had proved fatal were caused by the appellant. The testimony of Harmunia P.W.4 and Maniram P.W.6 and Nanbai P.W.5 has to be read as a whole. The prosecution did not seek permission from the trial Court to reexamine Harmunia P.W.4,

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Nanbai P.W.5 and Maniram P.W.6 after they had supported the defence version in toto in cross-examination. It is settled law that the statement of the accused appellant in the examination under Section 313 Cr.P.C. has to be read as a whole. The inculpatory part cannot be excluded and used for purpose of proving the guilt of the appellant. The burden of proving the guilt of the accused beyond the shadow of doubt always rests on the prosecution and never shifts. The prosecution cannot separate the threads from the cross-examination of the prosecution witnesses wholly supporting the defence version to prove guilt against the accused appellant. The entire evidence adduced by the prosecution leads only to the irresistible conclusion that deceased Kunwar Sai had in an intoxicated state assaulted his father Maniram P.W.6 with the Basula on the head whereupon Maniram P.W.6 had dealt the fatal blows on the head of the deceased by means of a lathi. Thereafter, when the deceased assaulted the appellant by a Basula, the appellant snatched the Basula and had inflicted only one injury on the cheek of the Kunwar Sai. No doubt, there is a strong possibility that Harmunia P.W.4, Nanbai P.W.5 and Maniram P.W.6 have in order to save the appellant developed the story of assault by Maniram by lathi on the head of Kunwar Sai. However, if the above mentioned testimony of these witnesses is to be ignored, then there is absolutely no other evidence to show that death of Kunwar Sai had occurred due to the assault by Basula by the appellant. Maniram P.W.6 in his examination-in-chief has only deposed that the appellant had assaulted Kunwar but has not

mentioned the weapon of assault. Nanbai P.W.5, Maniram P.W.6, Harmunia P.W.4 and Mangal Das P.W.1 have taken a complete somersault in the cross-examination and have completely supported the defence version.

14. We have considered the evidence led by the prosecution in this case and have given out thoughtful consideration to the arguments advanced. We find that the defence version is wholly plausible that the deceased had assaulted Maniram by a Basula whereupon Maniram had dealt the fatal blows by a lathi on the skull of Kunwar Sai whereafter Kunwar Sai had assaulted the appellant by a Basula and it was then that the appellant had snatched the Basula and assaulted Kunwar Sai only once by the Basula. We find that the learned trial Judge had stretched his imagination too far for arriving at the conclusion of the guilt of the appellant for committing murder of Kunwar Sai. We also find that the prosecution has failed to prove beyond reasonable doubt that the accused appellant had dealt the fatal blows by a Basula on Kunwar Sai and the defence version appears to be plausible that exercising the right of private defence Maniram (P.W.6) had first dealt the fatal blows on Kunwar Sai and thereafter when Kunwar Sai had assaulted the appellant by Basula, the appellant snatched the Basula and had assaulted Kunwar Sai only once. If the testimony of Mangal Das P.W.1, Harmunia P.W.4, Nanbai P.W.5 and Maniram P.W.6 in cross-examination is to be ignored as unreliable, then there remains no evidence on record to show that the appellant had dealt the fatal blows by a Basula on Kunwar Sai.

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The testimony of Mangal Das P.W.1 regarding the extra judicial confession made by the appellant is rendered wholly unreliable due to his statement in paragraph 9 wherein he has taken a complete somersault and supported the defence version in toto. The testimony of Dhanpat Bai P.W.2 regarding extra judicial confession made by the appellant is also rendered unreliable because in paragraph 2 of her cross-examination she has admitted that she could not hear correctly what the appellant had told her husband Mangal Das.

15. The only question which remains to be considered now is whether the appellant had exceeded his right of private defence. The evidence led by the prosecution goes to show that the appellant had dealt only one blow by the Basula to Kunwar Sai after Kunwar Sai had assaulted Maniram by Basula on the head and Maniram had dealt 2 – 3 lathi blows on the head of Kunwar Sai. If the version of Maniram P.W.6, Harmunia P.W.4, Nanbai P.W.5 and Mangal Das P.W.1 is to be believed, it shows that there was an imminent danger not only to the life of the appellant but also of Maniram (P.W.6) when the deceased assaulted them by the Basula. During investigation, the appellant was not sent for medical examination to find out if he had sustained any injury. Since there is no evidence on record to show that the injury sustained by the Kunwar Sai had been inflicted by the appellant by means of a Basula and also there is no evidence to show that the appellant had assaulted Kunwar Sai by the Basula more than once, it cannot be said that the accused appellant had exceeded

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the right of private defence of his person. If the version in cross-examination of the above mentioned witnesses is to be accepted, it clearly shows that the appellant had not exceeded the right of private defence and had merely dealt a single blow by the Basula over Kunwar Sai who had already sustained the fatal injuries at the hands of Maniram P.W.6. True, that the Post-mortem report of Kunwar Sai does not show any injury over the cheek, yet if the testimony of witnesses Harmunia P.W.4, Nanbai P.W.5 and Maniram P.W.6 in cross-examination is to be ignored, then there remains no evidence to connect the appellant with the fatal injuries sustained by Kunwar Sai. Thus, the defence version that the appellant had not inflicted the fatal blows on Kunwar Sai and had only inflicted a single injury by Basula in the exercise of right of private defence of his person appears to be plausible. The appellant is therefore entitled to the benefit of doubt. The conviction of the appellant under Section 302 I.P.C. for committing murder of Kunwar Sai cannot therefore be sustained.

16. In the result, the appeal is allowed. The appellant is acquitted of the charge under Section 302 of the I.P.C. The appellant shall be set at liberty, if not required in any other case.

Sd/-
**Fakhruddin**
**Judge**

Ajani

Sd/-
**Dilip Raosaheb Deshmukh**
**Judge**